U.S. Department of Labor

Board of Alien Labor Certification Appeals
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: February 3, 1999

Case No.: **1998 INA 194**

In the Matter of:

PACIFIC LINE CONSTRUCTION CLEAN-UP, INC., Employer,

on behalf of

JESUS J. AGUAYO, Alien

Certifying Officer: R. M. Day, Region IX.
Appearance: Aldo Beretta of Tustin, California, appeared as Agent for Employer and Alien

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that PACIFIC LINE CONSTRUCTION ("Employer"), filed on behalf of JESUS J. AGUAYO ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. [1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On June 22, 1995, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Fuel Injection Mechanic" in its Construction Disposal Clean Up Company.[2] The position was classified under DOT Occupation No. 620.281-050, Mechanic, Industrial Truck.[3] The Employer described the job duties as follows:

> Duties consist of repair/maintenance of heavy duty trucks & forklifts, including automatic & manual transmissions, using handtools, precision measuring instruments & machine tools; raises vehicles using hydraulic jack or hoist to gain access to mechanical units bolted to underside of trucks; removes engines, transmissions or disassembles engines & examines parts for defects, malfunction & excessive wear. Reconditions replaces parts, such as pistons, bearings, gears, valves & bushings using engine lathes, boring machines, handtools & precision measuring instruments. Welds & cuts parts using arc-welding & flame cutting equipment.

AF 11, box 13. The wage offered was $18.06 per hour for a forty hour week, with hours from 10:00 A.M. to 6:00 P.M., and overtime at time and a half. The education required was graduation from high school, plus three years of experience in the Job Offered. *Id*. Three U. S. workers---Mr. Logan, Mr. Moody and Mr. Stafford---applied for the position after it was advertised, but none of them was hired. AF 10a.

Notice of Findings. The CO denied certification in the July 23, 1997, Notice of Findings ("NOF"), concluding that the Employer failed to establish that its rejection of U. S. workers was

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[2] **The Alien**. A national of Mexico, the Alien was born in 1969. In 1984 he completed high school in Mexico. 1991 to 1995 the Alien worked as a Fuel Injection Mechanic in a "Mechanic Shop" in Mexico, where his job duties were substantially similar to the Job Description in the Application. AF 11. He was unemployed from March 1995 to the date of application.

[3] 620.281-050 **MECHANIC, INDUSTRIAL TRUCK** (any industry) alternate titles: truck repairer. Repairs and maintains electric, diesel, and gasoline industrial trucks, following manuals, and using handtools, power tools, and knowledge of electrical, power transmission, brake and other automotive systems: Reads job order and observes and listens to truck in operation to determine malfunction and to plan work procedures. Installs new ignition systems, aligns front wheels, changes or recharges batteries, and replaces transmissions and other parts, using handtools. Overhauls gas or diesel engines, using mechanic's handtools, welding equipment, standard charts, and hoists. Examines protective guards, loose bolts, and specified safety devices on trucks, and makes adjustments, using handtools. Lubricates moving parts and drives repaired truck to verify conformance to specifications. May fabricate special lifting or towing attachments, hydraulic systems, shields, or other devices according to blueprints or schematic drawings. *GOE: 05.05.09 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 81.*

based on reasons that were lawful and job-related and that its efforts to contact one U. S. worker more than fourteen days after receiving his resume indicated a lack of good faith. AF 09.[4]

Rebuttal. On August 26, 1997, the Employer filed a rebuttal that consisted of argument by counsel, which was countersigned by the Employer to verify. Employer argued that its evaluation of Mr. Logan as unreliable was correct and that he lacked experience as a Fuel Injection Mechanic, and had performed general maintenance on diesel engines and paint work. The Employer argued similarly as to Mr. Moody, who had never previously been employed as a Fuel Injection Mechanic, and it did not believe his resume assertions of experience. Moreover, the Employer said, attacking the qualifications of the interviewer did not alter the fact that neither of these applicants met the minimum experience requirements for the job.[5] The Employer said it failed to keep the interview appointment with Mr. Stafford because the owner, who was the interviewer, was ill and unable to attend on January 16, 1997. When this applicant returned the Employer's call to reschedule this interview on January 17, 1997, he had taken another position with another employer. The Employer argued that this fact was persuasive evidence that this U. S. worker was not available on the date originally scheduled for the interview, as well. Employer then argued that Mr. Stafford's resume failed to show experience as a Fuel Injection Mechanic and that the Alien should not suffer due to the Employer's infirmity on the date of the scheduled interview.

Final Determination. After considering Employer's Rebuttal, addressed to the NOF issues, the CO denied certification in the Final Determination that was issued October 31, 1997. AF 03-04. In denying certification, the CO found that the qualifications of the interviewer were relevant in determining the credibility of her conclusions as to the qualifications of the U. S. workers who applied for the job:

> If the interviewer doesn't know the difference between a carburetted and [a] fuel injected system, she could not intelligently assess an applicant's background. This is apparently what happened to these apparently qualified applicants: an inexperienced interviewer could not appraise their combinations of education, training and experience. And you do not explain how MOODY's supervisory experience would be irrelevant if it involved (as his resume points out) supervising mechanics engaged in the type of repairs stated in box 13.

In addition, said the CO, the Employer failed to offer "convincing documentation of a good-faith effort to consider qualified applicant STAFFORD." AF 04.

Appeal. The Employer appealed to BALCA on December 4, 1997. AF 01-02. The

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[4] The NOF reviewed the documentation and noted that Logan and Moody were rejected for reason that were neither lawful not job-related. Noting Employer's contention that Logan was "unreliable," the NOF said his employment by five employers in four years required further evidence to lead to that conclusion and that both Logan and Moody's reports of the job interview led to the inference that the Employer's interviewer was not qualified to conduct such interviews. In addition the NOF found that Employer's rejection of Stafford on grounds that he missed his interview was unsupported by the facts in evidence of record. The NOF then stated the corrective action to be taken and the rebuttal evidence required to respond to these findings

[5] The interviewer was the owner of the Employer.

Employer argued that the CO was in error. As to its rejection of Mr. Logan and Mr. Moody, the Employer argued that "an interviewer's qualifications in regard to engine mechanics is irrelevant," contending that it was in the same position as a major corporation whose hiring agent acts in a broad range of occupations without expertise in any of them. The duty of Employer's interviewer was not to be a qualified mechanic, it argued. "It was to objectively review the prior work experience of each applicant to determine if the applicant is sufficiently qualified for the position. The only portion of the applicant's backgrounds which was to be evaluated was the capacity and duration of the applicant's prior employment. Therefore, the interviewer had no need to appraise the 'combination' of the applicant's education, training and experience. Prior experience was the requirement. No training was relevant to qualifying for the position," said the Employer. AF 01. Employer then restated its reasons for rejecting the three U. S. workers referred.

Discussion

Burden of proof. In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification.[6] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[7]

The issue. The issue stated in the NOF and the Final Determination turned on the qualifications of the U. S. workers for the Job Offered. The basic element of Employer's proof is that it demonstrate that the job offered in its application has been and is clearly open to any qualified U. S. worker. 20 CFR § 656.20(c)(8). 20 CFR § 656.21(b)(2)(i) further requires that the hiring criteria for the job opportunity, unless adequately documented as arising from business necessity, shall be those normally required for the position in the United States. In this regard, 20 CFR § 656.21(b)(5) requires the employer to prove (1) that the job opportunity requirements described in its application represent its actual minimum hiring criteria for the position, and (2) that the employer has not hired workers with less training or experience for jobs similar to the position described in its application for alien labor certification. Finally, 20 CFR § 656.21(b)(6) provides that, "If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons."

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[6] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[7] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Analysis and conclusion. The state agency submitted the resumes of all three U. S. workers whom it referred as apparently qualified for the position of Fuel Injection Mechanic offered in this application. It later solicited and received from each of them the answers to a Follow-Up Questionnaire as to the events that transpired at their respective interviews. AF 22-23, 33-34, 38, 40-42.

Moody. Mr. Moody felt that he met the requirements of the job, which was not offered to him when he was interviewed. His resume included four years of experience in hydraulic, gasoline, and diesel maintenance, as well as in training and supervision of workers engaged in maintenance. His education and experience was gained as a Ground Support Technician in a Naval Air Maintenance Training Group and a Naval Air Technical Training Center from 1991 to 1995. AF 36-39.

Logan. Mr. Logan also felt he met the requirements of the job, which was not offered to him when he was interviewed. His resume included at least four years of experience as a Mechanic and as a Lead Vehicle Maintenance Mechanic for gas and diesel trucks and similar equipment while employed by four different companies from 1990 to 1995. When asked who interviewed him he replied, "I don't recall her name. However, she was not qualified to interview on the technical portion of the job." When asked whether the wages, requirement and job duties were discussed during the interview were the same as those advertised, he said, "I was asked how much I wanted and when I responded the interviewer had no idea what had been advertised." He then said, "It became obvious to me that they were looking for someone who spoke a second language (Spanish) since I was asked toward the end of the interview if I spoke any other languages. It was also mentioned that most of their employees didn't speak English and the possibility of a communication problem may exist. I was not directly asked if I spoke Spanish but I was specifically asked if I spoke a second language." Mr. Logan added, "... I feel that I was discriminated against and that the ad made no mention of bilingual skills. My experience in the industry has shown this to be a growing trend and this particular instance is a sure sign of deception on the part of the company to recruit a U. S. citizen." AF 31-34.

Stafford. Mr. Stafford was directed by Employer's letter to attend an interview at 9:00 AM on January 16, 1998. He reported that, "When I went for interview the person who I was to interview with was sick and not at the office. A second interview was set for the next week, but I had to take a job offer from another company before that interview took place so I canceled the second interview." His resume indicated that he had been a research technician in a research and development facility of a major petroleum industry producer from 1984 to 1995, and that he had worked as a Mechanic for three automobile distributors from 1974 to 1984, engaging in work that included engine overhaul, emission control, and the repair of transmissions, differentials, and brakes. His educational qualification was a degree of Associate of Arts, Automotive Technology, which he earned at a California college in 1974. AF 21-24.

Employer's recruitment report. While Employer's recruitment report confirmed the facts stated in the Follow-Up Questionnaire statement by Mr. Stafford, its account of the interviews and its reasons for rejecting Mr. Moody and Mr. Logan were inconsistent with their reports. AF 17-18. Mr. Moody, said the Employer, "does not have any experience nor familiarity with fuel injections systems. I need a Fuel Injection Mechanic not a general mechanic. Mr. Moody is disqualified because he lacks the necessary experience required for the position being offered[.]" AF 17 Continuing as to Mr. Logan, Employer's recruitment report

said at AF 18,

> During the interview Mr. Logan said he had experience, but he would not expand on exactly what type of experience he had. Also, Mr. Logan informed me that he wants full benefits if hired for the position.
>
> According to his resume, Mr. Logan seems to have difficulty in maintaining his jobs. He does not appear to last for very long in any position he works in. I investigated his references because of the fact he would not discuss his experience. When I contacted Robinson-Prezioso they informed me that they did no do any type of work on fuel injection systems. These types of jobs were sent out to another shop. Mr. Logan's responsibilities at this company included paint work and general maintenance of three diesel trucks. Please be advised that diesel engines do not even have fuel injection systems. ... Mr. Logan is disqualified for the position being offered because he has proven himself to be unreliable in his previous positions, he states that he will be unreliable in this position because of his school schedule, he does not have the necessary experience required for the position, and he is asking for benefits which were not offered in the job opening notice[.]

The Job Duties in the Application were examined in addressing Employer's comments as to Mr. Logan and Mr. Moody. First, while the Employer's position title was "Fuel Injection Mechanic," the position was classified under DOT Occupation No. 620.281-050, Mechanic, Industrial Truck, of which the Employer was aware at the time it advertised the position in the last week of November 1995 and interviewed the three U. S. workers during the third week of 1996. The Employer did not object to that classification in either its communications with the state employment security agency prior to referral to the Certifying Officer on April 4, 1996, or in its rebuttal response to the NOF. The job duties described in the DOT for an Industrial Truck Mechanic were substantially the same as the job duties as follows it stated in its description of the Job to be Performed in the Application, Form ETA 750A. Moreover, the duties that the Alien's Statement of Qualifications said he performed from 1991 to 1995 were virtually identical to those listed in its Application.[8] Notwithstanding Employer's arguments that both Mr. Logan and Mr. Moody lacked specific experience as a Fuel Injection Mechanic, the experience and qualifications each of them described in his resume were more than sufficient to qualify under the DOT description of this occupation, as classified under No. 620.281-050. In addition, except for the Alien's choice of nomenclature in describing his job title while working from 1991 to 1995, the duties he performed were substantially the same as the duties of an Industrial Truck Mechanic in DOT Occupation No. 620.281-050. Because of the job title used in Employer's application, the Panel examined the
Employer's description of the Job to be Performed in Form ETA 750A and found that none of the duties included any reference whatsoever to the fuel injection system or parts of anything whatsoever. In addition the Panel examined the DOT description of the work performed in Occupation No. 625.281-022, whose title is Fuel Injection Servicer (any industry).[9] The Panel

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[8] Compare footnote 3, box 13 with AF 11 and AF 60.

[9] 625.281-022 **FUEL INJECTION SERVICER (any industry)**. Rebuilds, tests, and calibrates fuel injection units as used on diesel engines, railroad locomotives, trucks, construction equipment, tractors, and power plants: Studies repair order and disassembles unit to determine cause of malfunction. Refinishes defective parts, using lapping machine

finds the duties of this occupation to be totally unrelated to the Employer's description of the Job to be Performed in Form ETA 750A, to the Alien's own qualifications, and to the resume qualifications of the three U. S. workers that the state agency referred for this position. From this it follows that this record contains no evidence that supported the Employer's reliance on the absence of experience in work under the title of Fuel Injection Mechanic in evaluating the qualifications of Mr. Logan and Mr. Moody. **Richard Lum**, 94 INA 219 (Jun. 27, 1995); **Hardee's**, 94 INA 218 (Jun. 27, 1995).[10]

In another context the U. S. Court of Appeals for the Fifth Circuit held in **Ashbrook-Simon-Hartley v. McLaughlin**, 863 F2d 410 (5th Cir., 1989), that the statutory scheme of the Act and the administrative responsibility placed on the DOL by the regulations require the CO to consider all relevant information in the application, including the job duties listed by the employer. In the instant case, the U. S. workers, Mr. Logan and Mr. Moody, met the minimum requirements as to education and experience stated in the Employer's application. They did not, however, claim to have held a position as a Fuel Injection Mechanic, which the Alien alleged in his Statement of Qualifications.[11] Pursuant to the Court's holding in **Ashbrook-Simon-Hartley v. McLaughlin**, however, the Panel compared the job duties required in the Employer's application with the work duties described in the statement of qualifications filed by the Alien and in the resumes of Mr. Logan and Mr. Moody, and found them substantially similar to the work described for the occupation of Industrial Truck Mechanic under DOT Occupation No. 620.281-050. For these reasons the Panel concludes that the evidence of record supported the CO's finding that Mr. Logan and Mr. Moody were, in fact, qualified and available at the time they were interviewed for the Job Offered. In addition, although the Employer alleged that its owner and interviewer was ill and unable to work on the date it scheduled for Mr. Stafford's job interview, it Employer did not deny that Mr. Stafford was qualified and was available to be hired on that day.

The Panel concludes that the NOF provided sufficient notice of the reasons for the denial of certification and told the Employer how to cure the defects found in the application, and that the Employer's rebuttal failed to sustain the burden of proving that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform the work required in its application for alien labor certification. As the evidence of record supports the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is

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to grind and smooth nozzle point and seat. Replaces parts which cannot be refinished. Assembles and calibrates injection pumps, using test equipment. Assembles and tests nozzle assemblies, using test equipment. *GOE: 05.05.09 STRENGTH: M GED: R4 M4 L4 SVP: 6 DLU: 77.*

[10] For cases on parallel issues see also **Mega Nursing Services, Inc.**, 93 INA 105 (Feb. 24, 1994); and **Teresa Yancey Crane**, 94 INA 032 (Apr. 28, 1995.

[11] As the CO apparently neglected to check with the Mexican employer to verify that it actually had a position bearing that title in its business and that the Alien actually worked under that title, the basis of the Alien's qualifications is not a factual issue that the CO referred to BALCA for determination in this appeal.

affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1998 INA 194
PACIFIC LINE CONSTRUCTION CLEAN-UP, INC., Employer,
JESUS J. AGUAYO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: December 2, 1998